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No. 83-1765

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILLIE BRAY, LORENE DAVIS, RANDOLPH WIGGINS, JOAN COLBURN, MARY ROE, JOHN DOE, and all other members of the Class,

Petitioners,

vs.

STATE OF MICHIGAN: Governor of the State of Michigan; MICHIGAN DEPARTMENT OF STATE: Secretary of State; MOTOR VEHICLE ACCIDENT CLAIMS FUND DIVISION: Director of the Motor Vehicle Accident Claims Fund; State Treasurer; DEPARTMENT OF COMMERCE—INSURANCE BUREAU: Commissioner of Insurance,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN
BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

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IS THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES A JURISDICTIONAL BAR TO PETITIONERS' APPEAL?

II

DO PETITIONERS POSSESS PROPERTY RIGHTS OR CONTRACT RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION?

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OPINION BELOW

The Michigan Supreme Court Opinion is reported at 418 Mich. 149, 341 N.W.2d 92 (1983), and appears at page 3a of Petitioners' Appendix.

JURISDICTION

The jurisdiction of this Court is barred by the Eleventh Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

US Const, Am XI provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Michigan Public Act providing appropriations, 1977 PA 98, provides, in pertinent part:

"Uninsured Motorists

Salaries and wages—not to exceed 88.0 positions	$ 1,350,800
Longevity and insurance	77,100
Retirement	208,100
Contractual services, supplies and materials	126,500
Travel	51,400
Equipment	3,100
Subtotal Uninsured Motorists	$ 1,817,000"

1965 PA 388; MCLA 500.3010; MSA 24.13010, provides:

> "No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto in limits for bodily

injury or death set forth in section 504 of Act No. 300 of the Public Acts of 1949, as amended, being section 257.504 of the Compiled Laws of 1948, under provisions approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles, including owners or operators insured by an insolvent insurer, because of bodily injury, sickness or disease, including death, resulting therefrom, unless the names insured rejects such coverage in writing as provided herein. All such policies shall contain a notice, displayed prominently on the front page of the policy, in at least 8-point type that such protection coverage was explained to him and that he can reject such coverage by notice in writing. Unless the named insured requests such coverage in writing, it need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverage in connection with a policy previously issued to him by the same insurer."

STATEMENT OF THE CASE

In 1965, the State of Michigan sought to remedy the problems of victims of tortiously liable uncollectible drivers. The Legislature enacted 1965 PA 198; MCLA 257.1101 *et seq*; MSA 9.2801 *et seq*, known as the Motor Vehicle Accident Claims Act. This act, by its title, stated its purpose as:

"AN ACT providing for the establishment, maintenance and administration of a motor vehicle accident claims fund for the payment of damages for injury to or death of certain persons or property damage arising out of the ownership, maintenance or use of motor vehicles in the state in certain cases."

The act was effective November 1, 1965, which was the first day of registration of all motor vehicles in the State of Michigan for the ensuing year. MCLA 257.226; MSA 9.1926.[1]

The Motor Vehicle Accident Claims Fund was initially funded by requiring each uninsured motorist to pay a $25.00 fee and each insured motorist a $1.00 fee at the time the vehicle is registered for the year. Uninsured motorist fees were increased to $35.00 in 1968 and to $45.00 in 1971. No insured motorist fees were paid during the fiscal year 1972-1973, but during the entire period approximately 25% of all fees collected were received from insured motorists. Also, insured drivers were required by 1965 PA 388; MCLA 500.3010; MSA 24.13010, to purchase uninsured motorist coverage in order to limit claims against the fund, unless they rejected such coverage in writing.

On October 31, 1972, the No Fault Insurance Act, 1972 PA 294; MCLA 500.3101 *et seq;* MSA 24.13101 *et seq,* was approved by the Governor. That act provided that on October 1, 1973, in addition to the introduction of the no fault concept, all motorists must be insured and must provide evidence of insurance. (95a) The No Fault Act was effective October 1, 1973 for compulsory insurance purposes because the only way to determine whether a vehicle was insured was to require proof of insurance in order to register the vehicle for the ensuing year. The 1973 registration period for commercial vehicles commenced October 1, 1972 and terminated the last day of February, 1973. The first date for registration of non-commercial vehicles for the year 1973 was November 15, 1972 and terminated March 31, 1973. However, the full $45.00 fee

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[1]

A 1966 statute provided that commercial vehicles and trailers commence registration on October 1 preceding the year designated on the plates. A 1967 statute provided that non-commercial vehicles commence registration on November 15 preceding the year designated on the plates.

was required if an uninsured vehicle was registered after the registration period terminated.

This action was commenced in August of 1973 in the Court of Claims for the State of Michigan and, by stipulation of the parties, removed to the Wayne County Circuit Court. The history of the progress of this suit through the courts of the State of Michigan is detailed in the majority opinion of the Michigan Supreme Court, commencing at 5a.

For the purpose of this appeal, Petitioners allege that they were deprived of property without just compensation in violation of the Fifth Amendment to the Constitution of the United States and that an alleged contract was impaired in violation of Article I, Section 10, of the United States Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution. The majority opinion of the Michigan Supreme Court, issued December 1, 1983, found that the uninsured motorist fee could only be viewed as a tax for the privilege of operating an uninsured motor vehicle. The Court found no contractual or licensing arrangements existed between Petitioners and the State, and therefore found Petitioners' constitutional claims without merit. (14a) The Court further found that Petitioners were entitled to a refund only if there was an express or an implied legislative intent to refund the fee.

REASONS FOR DENYING THE PETITION

I

THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BARS FEDERAL-COURT JURISDICTION OVER THIS SUIT BY PRIVATE PLAINTIFFS SEEKING MONEY DAMAGES FROM THE STATE OF MICHIGAN

This suit seeks retroactive money damages from the treasury of the State of Michigan for fees paid by Petitioners from October 1, 1972 through March 31, 1973, in order to register their uninsured vehicles for the year 1973 because the No Fault Act of the State of Michigan made insurance compulsory beginning October 1, 1973. It is the position of Petitioners that the Legislature of the State of Michigan should have enacted a refund because they could only drive their uninsured vehicles until October 1, 1973, instead of March 31, 1974, without violating the No Fault Act. As indicated in the opinion of the Michigan Supreme Court, the Michigan Legislature considered such a refund but enacted a law which made no provision for a refund. (13a)

Since no refund was enacted, Petitioners argue that the No Fault Act should not have required compulsory insurance until April 1, 1974. The No Fault Act was effective October 1, 1973 because that was the first day of registration of vehicles for the ensuing year. If the State had made April 1, 1974 the effective date of the No Fault Act, as Petitioners argue, then no proof of insurance would have to have been shown at registration and the uninsured motorist fee could be paid. This would mean, in effect, that an uninsured motorist who registered his/her vehicle for the year 1974 on March 31, 1974 would be required to have no fault insurance one day after

paying the uninsured motorist fee. The only feasible date for instituting compulsory insurance was the first date upon which registration of vehicles was permitted by Michigan law because proof of insurance could be required at that time. Petitioners have always assumed throughout their arguments that all Petitioners registered their vehicles on the last day of registration for non-commercial vehicles, March 31, 1973, and were therefore denied six months of their privilege to drive uninsured, even though commercial vehicles could register as early as October 1, 1972, and thus would have received a full year's privilege of driving uninsured. Moreover, all motorists who registered after October 31, 1972, the date the No Fault Act was enacted, which includes all non-commercial vehicles, were on notice by the enactment of the No Fault Act that their privilege to drive uninsured ceased on September 30, 1973.

Petitioners aver that certain property rights were created by Michigan law and that those property rights were violated by the State of Michigan, either through its inaction in failing to provide a legislative refund, or by its action in requiring insurance on October 1, 1973. Neither the majority nor the dissenting opinions in the Michigan Supreme Court found any contractual rights created by the Motor Vehicle Accident Claims Act. Neither opinion found that the fee was a regulatory fee. The majority opinion of the Michigan Supreme Court found that the fee was a tax.

The Motor Vehicle Accident Claims Fund is currently actuarily insolvent so that any refund of the tax would be directly from the state treasury. Therefore, this action is barred by the Eleventh Amendment to the United States Constitution. *Ford Motor Company* v *Department of Treasury*, 323 US 459; 65 S Ct 347; 89 L Ed 389 (1945). Even if a basis could be found for finding a federal constitutional violation, Petitioners' suit is barred by the Eleventh Amendment because

they are seeking retroactive relief against the State of Michigan. *Edelman* v *Jordan*, 415 US 651; 94 S Ct 1347; 39 L Ed 2d 662 (1974). This Court distinguished between prospective and retroactive relief when a state is sued by individuals for federal constitutional violations as follows:

> "The Court also has recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States. This is the significance of Edelman v Jordan, supra. We recognized that the prospective relief authorized by [*Ex parte Young*, 209 US 123 (1908)] 'has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely a shield, for those whom they were designed to protect.' 415 US, at 664, 39 L Ed 2d 662, 94 S Ct 1347. But we declined to extend the fiction of Young to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States. Accordingly, we concluded that although the difference between permissible and impermissible relief 'will not in many instances be that between day and night, id., at 667, 39 L Ed 2d 662, 94 S Ct 1347, an award of retroactive relief necessarily '"fall[s] afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force."' Id., at 665, 39 L Ed 2d 662, 94 S Ct 1347 (quoting Rothstein v Wyman, 467 F2d 226, 237 (CA2 1972) (McGowan, J., sitting by designation), cert denied, 411 US 921, 36 L Ed 2d 315, 93 S Ct 1552 (1973)). In sum Edelman's distinction between prospective and retroactive relief fulfills the underlying purpose of Ex parte Young while at the same time preserving to an important degree the constitutional immunity of the States."

***Pennhurst State School and Hospital, et al* v *Haldeman, et al*,** — US —; 104 S Ct —; 79 L Ed 2d 67, 81-82 (1984).

II

PLAINTIFFS POSSESS NEITHER A PROPERTY INTEREST NOR A CONTRACT PROTECTED BY THE UNITED STATES CONSTITUTION

When the State of Michigan established the Motor Vehicle Accident Claims Fund, it did not create property interests. Prior to adoption of the Motor Vehicle Accident Claims Act, uninsured drivers were permitted to drive their uninsured vehicles without the payment of any fee to the State of Michigan. Michigan experience had shown that uninsured drivers were largely uncollectible and that there was no recourse in most cases for their victims. The victims' pain and suffering was exacerbated by the fact that they were required to pay their own medical bills and absorb their wage losses.

The Motor Vehicle Accident Claims Act created a fund solely for the benefit of the victims of accidents where the driver was either unidentified or uninsured. There was no creation of a new right or a new entitlement in the Petitioners. What the Petitioners could do prior to the act—drive their vehicles uninsured—now required the payment of a fee. With this fee, they purchased nothing. They received no insurance; they received no contract. They remained fully liable for the accident. The only difference was that victims now had a reason to sue. The defense of uncollectibility had been statutorily eliminated by the Motor Vehicle Accident Claims Act.

The state, which became subrogated to the judgment of the victim, could suspend the driver's license and vehicle registration of uninsured drivers if they did not repay the judgment. Petitioners argue that they were not totally without benefits because they received an interest-free $10,000 loan

and free representation by an Assistant Attorney General. This characterization of the statute is wholly inaccurate, however, since the Assistant Attorney General represented the Motor Vehicle Accident Claims Fund and not the uninsured motorist. *Weisberg* v *DAIIE*, 36 Mich App 513; 194 NW2d 193 (1971); *Abbott* v *Secretary of State*, 84 Mich App 23; 269 NW2d 292 (1978), relief denied, 406 Mich 940 (1979). If the uninsured driver refused to enter into a repayment contract with the Secretary of State to pay the judgment, it was an Assistant Attorney General who then sought judgment against the uninsured driver even though the Secretary of State had already suspended both the uninsured driver's operator's license and motor vehicle registration.

Instead of buying a property right with the fee, the uninsured drivers bought the certainty of suit in the event they refused to admit liability and the certainty that they would lose their operator's licenses and motor vehicle registrations in the event they refused to enter into a repayment arrangement with the Secretary of State. It is small consolation that this arrangement for repayment was interest-free and it is doubtful that any uninsured driver paid the $45.00 fee in order to purchase this "benefit".

The Michigan Supreme Court commented in their Opinion (8a-9a) that if there were any benefits received by the Petitioners, those benefits elude the Court.

Petitioners next argue that they had an entitlement to drive uninsured for a certain period of time, which constituted a contract right. They certainly cannot claim such an entitlement from the statute. The statute did not provide licensing for a certain term or any refunds for a shorter term. As the Michigan Supreme Court points out:

> "... It [the statute] did not say that, if 30 days from the registration and the payment of the fee a person

> were to decide to purchase insurance, he could get a refund of 11/12 of the $45 fee, nor did it say that, if a person were to purchase and register a new uninsured motor vehicle halfway through the year, he would pay only half the $45 fee. It merely set a fee and the time and circumstances for paying the fee. . . ." (13a)

The $45.00 fee was paid not only during the registration period, October 1 through March 31, but also throughout the entire year whenever uninsured vehicles were registered for the first time. There clearly never was an entitlement to drive uninsured for a certain period; nor was there a contract, implied or otherwise, that indicated that the Petitioners were buying a privilege for a certain term. Uninsured drivers were not buying or receiving; instead, they were paying for a small part of the problem their class caused.

Petitioners argue that part of the 1973 fee was "unearned." Petitioners fail to acknowledge that their payments covered only a small part of the burden they caused. A larger burden was carried by the insured drivers, who not only paid a $1.00 fee, which approximated 25% of all fees collected by the fund, but also were required to carry mandatory uninsured motorist coverage which could only be rejected in writing. Uninsured motorist coverage was made a mandatory part of every policy issued in the State of Michigan in order to limit the number of claims which would be made upon the fund. Insured drivers were required to exhaust their own uninsured motorist insurance coverage before filing a claim with the fund. The fact that insured drivers rarely rejected the uninsured motorist coverage enabled uninsured drivers to pay a far smaller fee than would be necessary if all drivers could file a claim with the fund.

It is also important to note that the fund is still operative and accepting new claims. The Legislature enlarged the time

limits respecting the fund to cover accidents which occurred as late as January 2, 1976. (26a, fn 19). Until all minors injured in accidents prior to January 2, 1976 have reached majority plus the three year statute of limitation, the fund is liable for payment of new claims. The fund is currently actuarily insolvent and therefore it may be necessary to pay claims from the state treasury. In addition to future payments from the state treasury, in 1977, by Public Act No. 98, the Legislature appropriated $1,817,000 to cover administrative expenses of the fund in lieu of interest payments on the loan which it earlier made from the fund.

Truly, their is no constitutional or equitable reason why the taxpayers of Michigan should reimburse a portion of the 1973 fee to Petitioners, who contributed so little to remedy the problems they caused for their victims. Indeed, if anyone were entitled to a refund, it would be those insured drivers who responsibly carried uninsured motorist coverage in their policies as well as paid the annual $1.00 fee.

CONCLUSION

The State of Michigan has not waived its immunity from suit and is entitled to the protection of the Eleventh Amendment of the Constitution of the United States. Petitioners possess no property rights or contract rights protected by the United States Constitution. Equity would not be served by requiring the taxpayers to reimburse Petitioners whose uninsured driving was subsidized by the insured driving public of the State of Michigan. The petition should be denied.

Respectfully submitted,

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